BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEVEN KING	)	
Claimant	)	
	)	
VS.	)	
	)	
WICHITA SOUTHEAST KS TRANSIT	)	
Respondent	)	Docket No. 253,584
	)	
AND	)	
	)	
LIBERTY MUTUAL	)	
Insurance Carrier	)	

ORDER

Respondent appealed Administrative Law Judge (ALJ) Jon L. Frobish's Award dated October 29, 2001. The Appeals Board (Board) heard oral argument on April 12, 2002.

APPEARANCES

Steven R. Wilson of Wichita, Kansas, appeared for the claimant. Michael D. Streit of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUE

In Kansas, a workers compensation claimant is not entitled to a work disability award based on his actual wage loss if he acted in bad faith in refusing to attempt an accommodated job or in voluntarily removing himself from the labor market. In this case, claimant returned to his pre-injury job after his work-related injury and the assignment of

medical restrictions that would have prohibited claimant from performing his pre-injury job had he informed respondent of those restrictions. After performing the job for several months, claimant quit for personal reasons unrelated to his injury. Nevertheless, respondent did not have accommodated work available at that time. Is claimant barred from receiving work disability benefits? The nature and extent of claimant's disability is the only issue before the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the parties' stipulations, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was a truck driver on his date of accident, December 22, 1999. His position with respondent required long-distance travel and lifting over 30 pounds. While performing his work duties, claimant injured his back. He was off work for a time, but returned to his regular duties with respondent on February 24, 2000, after providing respondent a work release that did not reflect any medical restrictions.

Although claimant returned to work without accommodation, the preponderance of the evidence supports that claimant should never have returned to work as an over-the-road, long-haul truck driver. For instance, claimant's treating physician, Dr. M.S. Shakil, actually issued two disability certificates on February 24, 2000. The first indicated that claimant should not lift over 30 pounds, but the second said that claimant did not have any restrictions. Dr. Shakil testified that claimant specifically requested the second certificate so that he could return to work with respondent. And despite the second medical certificate, Dr. Shakil "medically . . . believed" claimant "needed a thirty pound weight limitation" and should not have been driving long distances at any time after his injury.[1]

Dr. Shakil was not alone. Dr. Philip Mills testified on claimant's behalf after examining claimant in January 2001. Based on his examination and his review of claimant's medical records, Dr. Mills likewise believed that claimant should not have been driving long distances or lifting over 20 to 30 pounds after his work-related injury.[2] In other words, both Dr. Shakil's opinion and Dr. Mills' opinion support that claimant should not have returned to work for respondent in February 2000 without accommodation.

Nevertheless, claimant continued to perform his pre-injury job duties without complaint until May 5, 2000, when he quit. The preponderance of the evidence supports that claimant did not leave respondent's employ because of his work-related injury. Instead, the evidence reflects that claimant voluntarily terminated his employment with

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[1] Shakil Depo. at 16-20.

[2] Mills Depo. at 20- 23, Ex. 3.

respondent so he could move to Illinois to be with his girlfriend and family. At no relevant time did claimant inform respondent about his medical restrictions or request an accommodated position. And for these two reasons, respondent argues that the ALJ erred by awarding work disability benefits when claimant's actions violated the spirit of the law behind *Foulk v. Colonial Terrace*[3] and *Copeland v. Johnson Group, Inc.*[4]

The Board rejects respondent's argument. First, the Board concludes that claimant's pre-injury job was inappropriate based on the job's physical requirements and claimant's medical condition. Therefore, claimant did not have to continue to perform the job and risk further injury and aggravation.[5] Moreover, while there was testimony that suggested that respondent might have been able to accommodate claimant's restrictions if asked to do so, this testimony was based on surmise and conjecture. According to respondent's employee with the most knowledge about claimant's background and qualifications, respondent had no jobs available for claimant within his restrictions during the relevant time frame.[6] Thus, the Board finds that the preponderance of the evidence supports that even if claimant asked for another position, respondent did not have accommodated work available for claimant. Under these circumstances, the fact claimant did not seek other accommodation from respondent does not suggest the absence of good faith or otherwise disqualify him from work disability benefits.[7]

At the time of the regular hearing, claimant was earning $665.00 per week, which represents a 32 percent wage reduction from claimant's $973.10 pre-injury average weekly wage. The ALJ also found that claimant sustained a 23 percent task loss as the result of his work-related injury. The ALJ arrived at this decision based on the task loss opinion of Dr. Philip Mills. The Board has examined the ALJ's reasoning and finds no reason to depart from his rationale. Accordingly, the Board's adopts the ALJ's determination that claimant sustained a 23 percent task loss. Averaging claimant's 32 percent wage loss with his 23 percent task loss, the Board concludes claimant has a 27.5 percent permanent partial general disability as the result of his work-related injury.

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[3] 20 Kan. App. 2d 277, 887 P.2d 140 (1994).

[4] 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *See Guerrero v. Dold Foods, Inc.*, 22 Kan.App.2d 53, 56, 913 P.2d 612 (1995).

[6] Gilpin Depo. at 16; Rhodes Depo. at 13.

[7] *See Cavender v. PIP Printing, Inc.*,___ Kan. App. 2d, 61 P.3d 101 (2003); *Oliver v. Boeing Co.*, 26 Kan.App.2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999).

AWARD

WHEREFORE, the Award entered by Administrative Law Judge Jon L. Frobish dated October 29, 2001, is affirmed.[8]

IT IS SO ORDERED.

Dated this _____ day of February, 2003.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Michael D. Streit, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation

[8] Claimant's permanent partial disability is limited to his 10 percent functional impairment during the time he continued to work and was earning at least 90 percent of his pre-injury average weekly wage. The ALJ's permanent partial disability award calculation only provides for the 27.5 percent work disability. But because the weekly compensation rate is the same and there is no gap in payments, the total award is the same either way.